BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PHYLLIS OSBEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,025,406
VILLA SAINT FRANCIS	)	
Respondent	)	
AND	)	
	)	
KANSAS ASSOCIATION OF HOMES	)	
FOR THE AGING I.G. c/o Thomas McGEE	)	
Insurance Carrier	)	

ORDER

Claimant appealed the February 14, 2011, Award entered by Administrative Law Judge (ALJ) Steven J. Howard. The Workers Compensation Board heard oral argument on May 20, 2011.

APPEARANCES

David C. Byerley of Kansas City, Missouri, appeared for claimant. Joseph R. Ebbert of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a November 24, 2004, accident and injuries to claimant's knees and low back. In the February 14, 2011, Award, ALJ Howard determined claimant was entitled to an award for a 5% functional impairment to her right leg and a 5% functional impairment to her left leg. In his Award, the ALJ made a finding that "Based upon the foregoing, the Administrative Law Judge is persuaded by the testimony of Dr. Lowry Jones, that claimant suffered no significant, albeit verbalized no complaints of back pain associated with her occupational accident of November 24, 2004 at the time of his

examination."[1] The foregoing statement makes it difficult for the Board to determine whether or not the ALJ found claimant's lumbar spine injury arose out of and in the course of her employment. The ALJ found claimant's ongoing progressive natural disease process was the cause of claimant's need for right knee replacement, not the contusions that claimant suffered on November 24, 2004.

Claimant argues that no evidence has been offered to rebut the statutory presumption that claimant, who sustained a loss of use to both legs as a result of her November 24, 2004, accident, is permanently and totally disabled and that claimant has established by her testimony and the testimony of vocational expert Michael J. Dreiling that she is permanently and totally disabled. In the alternative, claimant maintains she is entitled to an award for an 85.5% work disability based upon a 71% task loss and a 100% wage loss in addition to her knee injuries, she also sustained a low back injury as a result of her work-related accident. Claimant also contends respondent is liable for all past medical treatment related to her November 24, 2004, accident, including her right total knee replacement, as authorized treatment.

Respondent argues the Award should be affirmed. Respondent maintains there is no credible evidence that claimant is permanently and totally disabled, nor that she has a non-scheduled injury. Respondent argues it rebutted the statutory presumption that claimant is permanently and totally disabled. Further, respondent argues that claimant's total knee replacement did not result from her work-related accident and said treatment was unauthorized.

At regular hearing, and in his Award, the ALJ indicated payment of temporary total disability benefits from November 24, 2004 through August 1, 2005 or October 9, 2006, were in issue. In his Award, the ALJ made a finding of fact that claimant was never temporarily totally disabled as a result of her accident. Claimant did not appeal this issue and none of the parties addressed it in their briefs. Therefore, this Board affirms the ALJ's finding that claimant was never temporarily totally disabled.

The issues before the Board on this appeal are:

1. Did claimant suffer an injury to her lower back that arose out of and in the course of her employment?

2. If so, what is the nature and extent of claimant's lower back disability?

3. What is the nature and extent of claimant's right and left knee disabilities?

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[1] Award (February 14, 2011) at 7.

4. Is claimant permanently and totally disabled as a result of her work-related injuries?

5. If not, is claimant entitled to work disability as a result of her work-related injuries?

6. Is respondent liable for additional past medical treatment, including the right total knee replacement for claimant?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant worked for respondent as a certified nurse's aide from 1994 until August of 2005. On November 24, 2004, claimant attempted to break the fall of a resident, and in turn, the resident fell on claimant. As claimant fell, she hit the side guardrail of the bed with the resident's weight on her. Claimant believes her right knee struck the guardrail, but is uncertain. Claimant alleges that she injured her knees and back during the fall. Claimant testified that after the November 24, 2004, incident she had swelling in both knees and an increase in pain, with the right knee worse than the left.

Claimant continued to perform her normal work duties. Due to pain in her knees and back, claimant requested to see a physician. Respondent sent claimant to Concentra Medical Center where she was evaluated by Dr. Temeagen Wakawaya. On December 3, 2005, Dr. Wakawaya diagnosed claimant with a right knee strain, a left knee strain and an acute lumbar strain. Claimant again saw Dr. Wakawaya again on August 5, 2005, for ongoing right knee pain. Dr. Wakawaya indicated this was consistent with degenerative joint disease and suggested she see her family physician.[2]

Claimant voluntarily quit her employment in August 2005. She indicated no doctor told her she should not work. However, she indicated that human resources told her not to return to work because of her problems.

Claimant was next evaluated by Dr. Mary Redmon, claimant's primary care physician, whose impression was degenerative joint disease of the right knee along with other unrelated medical problems. An MRI for the right knee was ordered, and it revealed claimant had a complex tear of the posterior horn and body of the medial meniscus with maceration. The MRI also showed moderate to marked arthritis, or articular cartilage thinning, greatest in the medial and patellofemoral compartments but also present in the

[2] Clymer Depo. at Ex. 2, p. 2.

lateral compartment of the knee. Some fluid was noted in the joint as well as a cyst.[3] Dr. Redmon indicated that it was difficult to determine how much of the right knee pain was due to arthritis or overuse and how much was due to the injury.[4] Claimant was then referred to Dr. Steven W. Munns, an orthopedic specialist.

On October 26, 2005, claimant saw Dr. Munns, who indicated claimant had crepitus and meniscal tear in her right knee, and was tender to palpation around the patella and the medial joint line. Dr. Munns' assessment was that claimant had bilateral degenerative joint disease and recommended a total right knee joint replacement. Claimant did not immediately undergo the knee surgery, but rather was treated conservatively. She indicated this was because in October 2005, she learned she has diabetes, but also because of her weight. In July 2007, Dr. Munns performed arthroscopic surgery on claimant's right knee to repair the meniscus tear. Respondent argues clamant's meniscal tear occurred before the accident of November 24, 2004.

At a pre-hearing settlement conference held on September 15, 2008, claimant requested that Dr. Munns be authorized to perform the right knee replacement. Instead, the ALJ ordered that Dr. Lowry Jones be appointed to conduct an independent medical examination (IME) of claimant. Claimant indicated that at the pretrial settlement conference, the ALJ told her that she needed to request a preliminary hearing, and after the preliminary hearing was held, he would determine if the need for knee replacement surgery was related to the work injury.[5]

For unknown reasons, claimant did not see Dr. Jones until April 2009. After seeing Dr. Jones, claimant elected to undergo a right knee replacement by Dr. Munns, without obtaining authorization by the ALJ. Claimant indicated she had the right knee replacement because she fell and had to go to the hospital emergency room.[6] Dr. Munns' records are not in evidence, but the surgery is believed to have taken place sometime in May 2009.[7]

Claimant saw Dr. Douglas M. Rope, an internal medicine specialist, for a medical examination on October 9, 2006. Claimant reported she was injured when she fell while trying to stop a patient from falling out of bed. She told Dr. Rope that she twisted her right knee and low back, and also experienced some discomfort in the left knee. Claimant also told Dr. Rope she had a history of low back discomfort prior to the accident on

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[3] Rope Depo. at Ex. 2, p. 3.

[4] Clymer Depo. at Ex. 2, p. 3.

[5] R.H. Trans. at 11

[6] Id., at 12.

[7] Rope Depo. at Ex. S.

November 24, 2004. Dr. Rope determined that claimant suffered a macerated tear of the medial meniscus and had multicompartment arthritis in her right knee, with loss of weight bearing articular cartilage on imaging six months after acute trauma with a history of protracted weight bearing over the previous interval after the acute injury.[8] Dr. Rope indicated that it was impossible to state with certainty if the meniscus tear in the right knee occurred on November 24, 2004.

Dr. Rope agreed claimant would be a candidate in the future for a right knee replacement. He then assigned claimant a 15% permanent functional impairment to the body as a whole due to the fact she has an antalgic limp with shortened stance and documented moderate to advanced arthritic changes of the hip, knee or ankle and used an assistive device. Dr. Rope opined 1.5% of the impairment rating predated the November 24, 2004, injury. Dr. Rope utilized the AMA *Guides.*[9]

Without examining the claimant, Dr. Rope revised his permanent impairment rating of claimant's right knee. In a letter to claimant's attorney dated May 28, 2008, Dr. Rope opined claimant has a 30% permanent impairment to the right lower extremity attributable to the November 24, 2004 accident. Dr. Rope also assigned a 5% whole person impairment for claimant's low back discomfort. The right knee and low back ratings combine for a 19% body as a whole functional impairment rating.

Dr. Rope saw claimant again on April 27, 2010, and May 27, 2010, although his report is erroneously dated May 27, 2007.[10] Dr. Rope again changed some of his opinions. He indicated that " . . . I cannot be certain that any back symptoms represent a permanent discrete anatomic impairment related to the November, 2004, fall ratable under the *Guides."* He also stated: "It is hard to state with any certainty that she suffered an aggravation of her arthritic condition in the 2004 injury sufficient to cause or contribute to her need for total knee replacement."[11] Dr. Rope did not change the permanent impairment he assigned claimant's right knee. Dr. Rope also opined that within a reasonable degree of medical probability claimant suffered a left knee strain and an acute lumbar back sprain as a result of the November 24, 2004 fall.

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[8] Id., at Ex. E, p. 6.

[9] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment (*4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[10] Rope Depo. at 34-35.

[11] Id., at Ex. S, p. 3.

On October 10, 2010, Dr. Rope again sent a letter to claimant's attorney in response to a communication of September 28, 2010.[12] In that letter, Dr. Rope again indicated that he could not say within a reasonable degree of medical probability that claimant's need for a right knee replacement was predominantly caused by the November 24, 2004, accident. He also explained that claimant's degenerative joint disease is tricompartmental and only one of the compartments (the medial) could have been damaged by an acutely torn meniscus on November 24, 2004.

When examined by claimant's attorney, Dr. Rope equivocated:

> Q. (Mr. Byerly) Doctor, based on a reasonable degree of medical probability did Phyliss *[sic]* Osbey suffer an aggravation, intensification, or acceleration of her prior right knee condition as a result of her November 24, 2004 work injury?
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> Mr. Ebert: Objection. Lack of foundation.
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> Mr. Byerly: Go ahead. You can answer.
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> A. (Dr. Rope) Well, I stated in the '06 report that I felt that it did. My opinion has evolved somewhat.
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> As you know, I saw her again in May of this year and at that time I said no, that I could not state that to a degree of medical certainty.
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> Q. Well, we're going to get into that, Doctor. I think what you stated was you couldn't state with a reasonable degree of medical certainty whether there was an aggravation, intensification, or acceleration of her prior knee condition which would have caused or contributed to cause the need for a total knee replacement.
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> My question is different. I'm simply asking you if based on reasonable medical probability Phyliss *[sic]* Osbey suffered an aggravation, intensification, or acceleration of her prior right knee condition as a result of her November 24, 2004 work injury?
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> Mr. Ebbert: Same objections.
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> A. Yeah, I think there was some aggravation, yes.[13]

Dr. Rope did place the following restrictions upon claimant:

> As a result of her current condition regarding the right knee, she cannot reliably and safely bear weight primarily on the right leg due to her arthritis. He[r] standing is

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[12] Id., at Ex. Z.

[13] Id., at 21-22.

> limited to 20 minutes and no more than 40% to 50% out of an eight hour period. She cannot safely squat. She should limit lifting to heights that are at or above knee level in order to avoid having to bend forward at the waist due to her inability to squat and thereby protect the lower back from injury. All lifting and carrying should be limited to no more than white *[sic]* weights by standards of that United States Department of Labor Dictionary of Occupational titles (exerting up to 20 lbs. force occasionally and/or up to 10 lbs. force frequently and a negligible amount of force constantly).[14]

Dr. Rope testified that the word "white" should have been 'light", and based upon the restrictions he imposed, claimant could no longer perform 10 of the 14 tasks contained in the January 4, 2007, report of vocational expert, Michael J. Dreiling. Dr. Rope indicated his opinions as to Claimant's permanent restrictions and task loss were the same after his May 2010, examination of claimant as they were in October 2006 and May 2007.[15] Mr. Dreiling testified that he believed claimant is not realistically capable of going back to work in the labor market.[16]

Prior to the November 24, 2004, fall, claimant indicated she never made complaints to her family doctor about left knee or back pain. However, Dr. Rope testified that in 2001, that claimant visited the Kansas University Physician's Department of Family Medicine for left leg pain and low back pain relevant to the right leg, with a diagnosis of a possible meniscus tear. Claimant indicated she also had occasional aching in both knees prior to the November 24, 2004, fall. However, prior to November 24, 2004, claimant denied any swelling of the knees or collapsing of the knees. Claimant also told Dr. Rope she had low back discomfort sometime prior to 2004, when she spent time off of work caused when she was injured trying to break a patient's fall.

At respondent's request claimant was examined by Dr. David J. Clymer, an orthopedic surgeon, on June 4, 2007. Dr. Clymer testified claimant suffered a right knee strain, a left knee strain and an acute lumbar strain as a result of her work injury on November 24, 2004.[17] He testified claimant was rather large and deconditioned. He further indicated she had some generalized lower back irritability and discomfort with mild limitation of lumbar range of motion, with side to side bending also causing some low back discomfort. Dr. Clymer opined claimant did not have a work-related impairment with regard to the back.[18]

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[14] Id., Claim. Ex. E at 7.

[15] Id., at 40.

[16] Dreiling Depo. at 17.

[17] Rope Depo. at 19.

[18] Id., at 17.

Dr. Clymer indicated claimant has chronic, progressive, degenerative arthritis in both knees, with findings on the left worse than the right. When Dr. Clymer saw claimant, she had not undergone the right knee replacement performed by Dr. Munns. Dr. Clymer opined claimant has a 10% permanent functional impairment to the body as a whole due to her knees. He indicated the permanent functional impairment to each knee is 12% to 14%, with 2% to 3% attributable to the November 24, 2004 injuries. Dr. Clymer indicated this converted to a 10% permanent impairment to the body as a whole with 2% attributable to claimant's accident. All of these ratings were made pursuant to the AMA *Guides.*

Dr. Clymer was of the opinion that claimant will need right and left knee replacements are necessary because of degenerative arthritis, obesity and varus misalignment that were present before November 2004. Dr. Clymer stated, "I do not feel the work-related event described and reviewed above has resulted in significant or substantial additional aggravation such that the work event is a significant contributing factor in the need for total knee replacement."[19]

Pursuant to an Order of the ALJ dated October 6, 2008, claimant underwent an independent medical examination by Dr. Lowry Jones, Jr., on April 9, 2009. At the time claimant saw Dr. Jones, she weighed 284 lbs. Dr. Jones testified that claimant suffered strains to her right and left knees as well as her lower back in her work injury of November 24, 2004.[20] Claimant made no low back complaints to Dr. Jones and, therefore, he did not assign her any impairment or restrictions due to her lower back. In his report Dr. Jones stated:

> It is my opinion that the injury she sustained in 2004 certainly did not cause any significant osteoarthritis of her knees. It did not advance the osteoarthritis disease and it did not change the natural history. She would have required and did require right and left total knee replacements in 2005 as well she does in 2009. It did result in increasing pain of her knee. However, there is history to suggest that she had a possible meniscal tear even prior to her injury. The complexity of her meniscal tear at the time of arthroscopy certainly is not consistent with her history of her direct knee contusion. It also did not give her any relief of her knee pain which would suggest that the meniscal tear was not the source of her knee pain on presentation. Therefore, the presentation at this time of severe bilateral knee arthritis pre-existed her injury.[21]

At the request of claimant's attorney, claimant was seen by Michael Dreiling, a vocational rehabilitation expert. He determined claimant performed 14 job tasks in the 15 years prior to the accident, and that she will be essentially and realistically unemployable

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[19] Id., Ex. 2 at 6.

[20] Jones Depo. at 23.

[21] Id., Ex. 2, at 3.

in the open labor market. Mr. Dreiling indicated claimant continued to work for a year after her accident, but then suffered subsequent medical difficulties and was laid off due to those ongoing medical difficulties. Dr. Rope testified due to her restrictions, claimant could no longer perform 10 of the 14 job tasks. However, the restrictions Dr. Rope imposed were for claimant's right knee only.

Dr. Jones opined that pursuant to the AMA *Guides*, claimant has a permanent functional impairment of 5% to each knee for a 4% whole body impairment as a result of the November 24, 2004, accident. Dr. Jones was not asked to address whether claimant needed any permanent restrictions as a result of her knee injuries. He testified that the 5% impairment to claimant's knees in isolation of the underlying osteoarthritis, does not render claimant unable to work.[22]

Dr. Jones indicated that neither the arthroscopic surgery to claimant's right knee, nor her right knee replacement could be considered emergency surgeries. Dr. Jones testified that with a reasonable degree of medical probability, the meniscal tear in claimant's right knee was not caused by the November 24, 2004, accident.[23] He also testified that within a reasonable degree of medical probability the aggravation suffered by claimant to her right knee on November 24, 2004, would not have required a right knee replacement.[24]

Dr. Jones determined claimant has no ratable impairment to her lower back.[25] Dr. Jones indicated that claimant denied having any significant continued lower back discomfort, but he does not deny she had a lower back strain as a result of her accident.

Did claimant suffer an injury to her lower back that arose out of and in the course of her employment?

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[26] A claimant must establish that his personal injury was caused by an "accident arising out of

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[22] Id., at 18.

[23] Id., at 15-16.

[24] Id., at 20.

[25] Id., at 16-17.

[26] K.S.A. 44-501(a) (Furse 2000); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

and in the course of employment."[27] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[28]

In order for a claimant to collect workers compensation benefits, he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[29]

The ALJ was persuaded that claimant suffered no back injury as a result of the November 24, 2004, incident. Base on the testimony of Dr. Jones that at the time he examined claimant, she suffered no significant, albeit verbalized no complaints of back pain associated with her accident. The Board disagrees and finds that claimant suffered a back strain arising out of and in the course of her employment on November 24, 2004. Claimant indicated she hurt her knees and back when she fell at work. Every physician who examined claimant and testified concurred claimant suffered a back injury that was work-related. Dr. Wakawaya after examining claimant, diagnosed her with an acute lumbar strain.

What is the nature and extent of claimant's lower back disability?

Dr. Clymer was employed by respondent to examine claimant, and testified he found no evidence of a permanent impairment to claimant's low back. Dr. Jones, who was appointed by the ALJ to examine claimant, also opined claimant has no permanent functional impairment to her lower back. At the request of claimant's attorney, Dr. Rope saw claimant on October 9, 2006; April 27, 2010; and May 27, 2010. Initially he opined claimant had a 5% whole body impairment as a result of a low back injury. However, when Dr. Rope was deposed on October 18, 2010, he testified that his prior impairment rating as it relates to the low back is no longer applicable. He opined claimant has no permanent impairment to her low back.

From December 2004, until August 2005, claimant did not seek medical treatment for any of her injuries. In August 2005, she sought treatment primarily for her right knee. Since her fall in 2004, claimant has received minimal treatment for her low back. Simply

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[27] K.S.A. 44-501(a).

[28] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[29] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

put, this Board finds the greater weight of evidence supports a finding that claimant did not suffer a permanent functional impairment to her lower back or that her back injury resulted in any restrictions.

What is the nature and extent of claimant's right and left knee disabilities?

Dr. Jones opined claimant has a 5% permanent functional impairment to each knee as a result of her fall on November 24, 2004. Claimant suffered a contusion to her knees in the accident, aggravating her pain. However, the primary source of her pain was arthritic disease. Dr. Jones determined that before claimant's accident, she had significant degenerative arthritis in all three compartments of her knees. He also opined that her condition would have worsened had she not fallen on November 24, 2004.

Dr. Rope assigned claimant two different permanent impairments. On October 9, 2006, Dr. Rope gave claimant a 15% permanent impairment to the body as a whole and opined 10% of the permanent impairment (or 1.5%) was pre-existing. He indicated a 15% permanent impairment was usually given to patients with antalgic limp with a shortened stance phase and documented moderate to advanced arthritic changes of the hip, knee or ankle. On May 28, 2008, Dr. Rope opined claimant has a 30% impairment rating to her right lower extremity attributable to her fall on November 24, 2004. However, Dr. Rope never gave claimant a separate impairment rating for her left knee.

Dr. Clymer opined claimant suffers a 12% to 14% impairment to each knee with 2% to 3% attributable to her injury on November 24, 2004. He viewed x-rays taken of claimant's knees in the fall of 2005, which revealed claimant already had significant degenerative arthritis. All of the physicians who testified opined claimant had significant pre-existing degenerative arthritis before her fall. Drs. Rope and Clymer indicated that part of their impairment ratings are attributable to claimant's pre-existing knee problems.

The ALJ was persuaded by the testimony of Dr. Jones, that claimant suffered a contusion to both knees as a result of her fall. He opined that claimant has a 5% permanent partial impairment to her right knee and a 5% permanent partial impairment to her left knee. This Board affirms the ALJ and finds claimant suffered a 5% permanent partial impairment to each knee, as a result of her work-related accident on November 24, 2004.

Is claimant permanently and totally disabled as a result of her work-related injuries?

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms,

> both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The ALJ did not make any specific finding concerning whether claimant is permanently and totally disabled as a result of her work-related injuries. The ALJ only awarded claimant a permanent partial disability based on the 5% permanent impairment Dr. Jones assigned to each knee. This implies the ALJ found that respondent rebutted the presumption that claimant is permanently and totally disabled. Both claimant and respondent addressed this issue in their submission letters to the ALJ. In her Application for Review, claimant asked this Board to review ". . . whether respondent and carrier are liable for permanent total disability or in the alternative work disability. . ."[30] Claimant and respondent discussed this issue at length in their briefs to this Board.

An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."[31] Because claimant suffered injuries to both knees, K.S.A. 44-510c(a)(2) creates a rebuttable presumption that she is permanently and totally disabled. Claimant's counsel asserts only claimant presented any evidence concerning her employability and, therefore, it is uncontroverted that she is permanently and totally disabled. He also argues claimant's age, education, work experience and knee pain prevent her from being employable.

Claimant also asserts that she did not return to work after August 2005, because the aggravation of her pre-existing condition made it impossible for her to return to work. Claimant immediately returned to work after her accident, and continued to work for nine more months. She then voluntarily quit. No doctor took her off of work. This supports respondent's argument that it was claimant's progressive chronic degenerative arthritis that caused her to quit her employment in August 2005, not injuries from her work-related accident.

Respondent counters that if the November 24, 2004, accident had not occurred, claimant would have the same knee problems that she currently has. Respondent asserts it was claimant's degenerative arthritis that precluded her from working, not her work-related injuries. Respondent argues Dr. Rope's opinion concerning claimant's ability to work should not be considered because he did not rate claimant's left knee.

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[30] Application for Review (February 18, 2011) at 1.

[31] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

By concluding claimant is not permanently and totally disabled, the ALJ gave deference to the opinions of Dr. Jones. Dr. Jones provide an independent medical examination of claimant, and unlike Dr. Rope or Dr. Clymer was not hired by claimant or respondent. Dr. Jones opined the knee injuries suffered by claimant on November 24, 2004, did not render her unable to work. K.S.A. 44-510c (a)(2) states, "[p]ermanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

Respondent has rebutted that claimant is permanently and totally disabled. Respondent deposed Dr. Jones, who testified claimant's work-related accident did not prevent her from working. Drs. Jones and Clymer indicated claimant suffered knee contusions on November 24, 2004, which aggravated her knee pain, but did not cause any structural change to her knees. Dr. Rope testified as to claimant's task loss, but never testified whether the restrictions he placed upon claimant prevented her from engaging in substantial and gainful employment. Dr. Rope changed his opinion as to claimant's knee and back impairments, but indicated his permanent restrictions remained the same. This calls into question his credibility on the issue of claimant's ability to be substantially and gainfully employed.

Mr. Dreiling opined claimant is realistically unable to obtain employment in the open labor market. However, Mr. Dreiling based his opinion on the restrictions in Dr. Rope's October 2005 report, which are for claimant's right knee. Mr. Dreiling issued a report on January 24, 2007, and a supplemental report on July 27, 2008. When he testified, Mr. Dreiling indicated that prior to issuing his supplemental report, he had reviewed Dr. Rope's May 29, 2007, report. At the time Mr. Dreiling issued his supplemental report, he did not have the benefit of reviewing Dr. Rope's May 27, 2010, report; Dr. Rope's deposition, Dr. Jones' report or Dr. Jones' deposition.

This Board finds that claimant is not permanently and totally disabled. The ALJ's conclusion that claimant is not permanently and totally disabled is supported by the greater weight of credible evidence in this record. The knee contusions suffered by claimant on November 24, 2004, did not render her permanently and totally disabled. Those injuries merely aggravated claimant's pain. If claimant is unable to be substantially and gainfully employed, it is due to other factors, including progressive chronic degenerative arthritis.

Is claimant entitled to work disability as a result of her work-related injuries?

The ALJ concluded claimant is not entitled to work disability by finding claimant was entitled to an award based on a 5% permanent functional impairment to each knee. Claimant argues that if she is not permanently and totally disabled, then she is entitled to work disability of 85.5%. Claimant has not worked since August 2005, and therefore, has a wage loss of 100%. Dr. Rope opined claimant cannot perform 10 of 14 job tasks, for a

task loss of 71%. However, Dr. Rope's opinion on task loss is questionable. Dr. Rope's letter to claimant's counsel dated October 6, 2006, clearly indicates the restrictions he imposed upon claimant were only for her right knee, and the task loss of 71% is based upon those restrictions Dr. Rope did not assign claimant any restrictions because of her left knee or back injuries.

Dr. Jones opined claimant suffered contusions to her knee and an increase in her pain, but did not accelerate or aggravate her degenerative arthritis. Dr. Jones opined claimant's greatest restrictions are caused by her progressive chronic degenerative arthritis, not her accident. Simply put, claimant's wage loss and task loss are due to her degenerative arthritis, not the knee contusions she suffered on November 24, 2004.

In her Brief, claimant cites *Rabbass v Robinson's Delivery Services, Inc.*[32], to support her premise that claimant is entitled to work disability, even though she had no permanent impairment to her lower back. However, in *Rabass,* claimant had permanent restrictions due to a non-scheduled injury. Only Dr. Rope gave claimant restrictions, but the restrictions were caused by her right knee injury. In 2006, Dr. Rope did limit claimant to lifting to heights that are at or above knee level in order to avoid having to bend forward at the waist due to her inability to squat and thereby protecting the lower back from injury. This restriction was given at a time when Dr. Rope believed claimant had suffered a permanent impairment as a result of her accident. Dr. Rope indicated his 2006 restrictions were based on a clinical presentation that claimant had a bad knee that was aggravated by her fall.

Claimant chooses to ignore *Casco,*[33] which addressed the issue of computing a recovery in parallel injury claims. In *Casco,* the Kansas Supreme Court ruled that scheduled injuries are now the rule. Unless a claimant can show he or she is permanently and totally disabled as a result of parallel injuries, then any recovery is limited to separate scheduled impairments. The greater weight of the evidence shows that claimant is not permanently and totally disabled and, therefore, her recovery is limited a to separate scheduled impairment to each knee.

Is respondent liable for additional past medical treatment, including the right total knee replacement for claimant?

The ALJ determined the need for corrective surgery to claimant's right knee was not due to her occupational injury, but instead the result of the underlying degenerative disease process. He cites the fact that claimant continued to work nine months after her accident,

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[32] *Rabbass v Robinson's Delivery Services, Inc.* Dkt. No. 1,030,070a, 2010 WL 2242747 (May 10, 2010)

[33] *Casco v. Armour Swift-Eckrich,* 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

and her knee replacement was four and one-half years after her accident. Claimant asserts her medical treatment after August 30, 2005, was reasonable and necessary and caused by her work injury. Respondent counters that the right knee surgeries performed by Dr. Munns were not authorized and were not work-related.

At a pre-hearing settlement conference on September 15, 2008, claimant requested knee surgery from Dr. Munns. The ALJ declined claimant's request, and instead referred claimant to Dr. Jones for an IME. Approximately a month after seeing Dr. Jones, without seeking authorization, claimant had Dr. Munns perform a total right knee replacement. Dr. Munns previously provided claimant unauthorized conservative treatment and arthroscopic surgery. Drs. Jones and Clymer indicated neither of claimant's surgeries were of an emergency nature.

Respondent argues that claimant's injury was not the cause of her medical treatment by Dr. Munns. Drs. Jones and Clymer opined claimant's right knee surgeries were necessitated by her progressive chronic degenerative arthritis. Both physicians indicated claimant's occupational accident only aggravated her symptom of pain, and did not cause any structural changes that would necessitate a knee replacement. Dr. Jones indicated the November 24, 2004, aggravation to claimant's pre-existing right knee condition would not have required a right knee replacement. Dr. Clymer testified that a doctor would not reasonably perform a knee replacement if a person has subjective complaints of knee pain, but where the knee has no structural deformity.

Even Dr. Rope could not say claimant's right knee replacement was engendered or the need was engendered predominately by the accident. He stated in his May 27, 2010, report that it was hard to say with any certainty that claimant suffered an aggravation of her arthritic condition in the 2004 injury sufficient to cause or contribute to her need for total knee replacement.[34] He indicated that by the time Dr. Munns first saw claimant, she had a year of abrasion to the medial compartment and had significant degeneration.

The Board finds claimant's medical treatment, including her surgeries by Dr. Munns, was unauthorized and not caused by her accident. Claimant could have requested authorization from the ALJ for her right knee replacement, but failed to do so. Simply put, the aggravation to claimant's right knee caused by her work-related accident did not necessitate her right knee replacement. Therefore, claimant's request that respondent be required to pay claimant's medical bills from the University of Kansas Hospital and the University of Kansas Physicians contained in Exhibits X and Y of claimant's December 9, 2010, deposition is denied.

[34] Rope Depo. at 42.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[35] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

CONCLUSION

1. Claimant was never temporarily totally disabled.

2. Claimant suffered a back injury arising out of and in the course of her employment, but her back injury did not result in a permanent impairment or any permanent restrictions.

3. Claimant suffered a 5% impairment to each knee.

4. Claimant has no restrictions to her left knee as a result of her work-related accident.

5. Claimant is not permanently and totally disabled.

6. Claimant is not entitled to work disability.

7. Claimant's medical treatment by Dr. Munns was unauthorized and was not caused by injuries suffered in her work-related accident. Therefore, respondent is not liable to pay the medical bills of Dr. Munns and other treatment claimant received from The University of Kansas Hospital and the University of Kansas Physicians which are contained in Exhibits X and Y of claimant's deposition of December 9, 2010. Respondent shall be liable to pay medical expenses for all treatment authorized by respondent as a result of claimant's November 24, 2004, accident.

AWARD

WHEREFORE, the Board February 14, 2011, Award entered by ALJ Howard is affirmed in part and reversed in part.

The Board finds claimant's back injury arose out of and in the course of her employment but the Award is affirmed in all other aspects.

The Board adopts the remaining orders set forth in the ALJ's Award to the extent they are not inconsistent with the above.

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[35] K.S.A. 2010 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this ____ day of July, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David C. Byerley, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge